Office-Supreme Court, U.S.
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80-1963

IN THE

Supreme Court of the United States

SPRING TERM 1981

NO. _____

RUPERT BELL,
Petitioner

versus

HERBERT HAROLD HINKLE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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QUESTIONS PRESENTED

I. WHETHER RUPERT BELL, HAS STATED A VIABLE CAUSE OF ACTION UNDER THE UNITED STATES CONSTITUTION FOR WHICH RELIEF COULD BE GRANTED DURING THE COURSE OF HIS TRIAL IN BRAZORIA COUNTY, TEXAS IN HIS CLAIM AS AN ILLEGITIMATE HEIR OF TOMMY HINKLE.

II. WHETHER RUPERT BELL'S CAUSE OF ACTION WAS BARRED UNDER THE ONE YEAR STATUTE OF LIMITATIONS CONTAINED IN SECTION 13.01 OF THE FAMILY CODE.

III. WHETHER AN ILLEGITIMATE CHILD IN TEXAS COULD INHERIT FROM HIS BIOLOGICAL FATHER BY THE LAWS OF DESCENT AND DISTRIBUTION AND ACCORDING TO THE TEXAS PROBATE CODE PRIOR AND AFTER AUGUST 27, 1979.

IV. WHETHER AN ILLEGITIMATE CHILD WHO DID NOT BRING A PATERNITY SUIT WITHIN ONE YEAR OF HIS BIRTH UNDER SECTION 13.01 OF THE TEXAS FAMILY CODE COULD INHERIT FROM HIS BIOLOGICAL FATHER BECAUSE SAID ONE YEAR STATUTE OF LIMITATIONS IS CLEARLY UNCONSTITUTIONAL AND VIOLATES THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

V. WHETHER THE INJECTION OF RACIAL PREJUDICE THROUGHOUT THE COURSE OF THE TRIAL BELOW WAS OF SUCH A NATURE AS TO RENDER THAT TRIAL A TRAVESTY OF JUSTICE AND TO REQUIRE REVERSAL OF THE JURY VERDICT.

INDEX

	Page
AUTHORITIES CITED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	4
STATEMENT OF FACT	6
SUMMARY OF ARGUMENTS	9
ARGUMENTS AND AUTHORITIES	10
CONCLUSION	26
CERTIFICATE OF SERVICE	27
APPENDIX "A"	A-1
APPENDIX "B"	B-1
APPENDIX "C"	C-1

AUTHORITIES CITED

Page

UNITED STATES SUPREME COURT CASES

Carrington v. Rash, 85 S.Ct. 775 (1965) 17
Glona v. American Guaranty & Liability Ins. Co., 88 S.Ct. 1515 (1968) 13, 14, 15, 16
Gomez v. Perez, 93 S.Ct. 872 (1973) 19, 20, 22
Labine v. Vincent, 91 S.Ct. 518 (1978) 15
Lalli v. Lalli, 99 S.Ct. 518 (1978) 9, 21
Levy v. Louisiana, 88 S.Ct. 1509 (1968) 13, 14, 15, 16, 20
New Jersey Welfare Rights Organization v. Cahill, 93 S.Ct. 1700 (1973) 18
Stanley v. Illinois, 92 S.Ct. 1208 (1972) 16, 17, 20
Trimble v. Gordon, 97 S.Ct. 1459 (1977) 9, 11, 20, 23, 25
Weber v. Aetna Casualty & Surety Co., 92 S.Ct. 1400 (1972) 15, 16, 18, 20

Page

TEXAS CASES

Alvarado v. Gonzales, 552 S.W.2d 539 (Tex. Civ. App.—Corpus Christi 1977, no writ) 24
Catchings v. Hamm, 560 S.W.2d 194 (Tex. Civ. App.—Waco 1977, no writ) 24
G__ v. P__, 466 S.W.2d 41, (Tex. Civ. App.—San Antonio (1971), writ ref'd n.r.e.) 22
Home of the Holy Infancy, 297 S.W.2d 208 19
In Re Miller, __S.W.2d__, (Tex. Civ. App.—Ft. Worth, 1980, appl. for writ of error filed) (No. 18328 in Court of Civil Appeals for Second Supreme Judicial District of Texas, Ft. Worth, Texas, opinion rendered July 24, 1980) 11, 24
In Re R____ v. M____, 530 S.W.2d 921 (Tex. Civ. App. —Waco 1975, no writ) 24
Lovejoy v. Lillie, 569 S.W.2d 501 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.) 11, 23, 25

STATUTES

28 U.S.C. § 1257(3) (1979) 2
28 U.S.C. § 1331 (1979) 2
28 U.S.C. § 1343 (1979) 2
42 U.S.C. § 1983 (1979) 2
TEX. REV. CIV. STAT. ANN., Art. 5535 (Supp. 1975) .. 25

CODES

TEX. FAMILY CODE ANN. § 11.03 (Supp. 1975) ..... *passim*
TEX. FAMILY CODE ANN. §§ 13.01 - .09 ..... *passim*
TEX. FAMILY CODE TITLE II (Supp. 1973) 19
TEX. FAMILY CODE ANN. § 13.21(e) 22, 24, 26
TEX. PROBATE CODE § 42 (1955), and as amended (1977), (1979) ..... *passim*

MISCELLANEOUS

U. S. CONSTITUTION, Fifth Amendment ..... *passim*
U. S. CONSTITUTION, Fourteenth Amendment ..... *passim*
H. Clark, Domestic Relations, Cases & Problems 224 (2d Ed. 1974) 16
Texas Family Code's Symposium, 5 Tex. Tech Law Rev. 267 (1974) 19

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OPINIONS BELOW

The Fourteenth Court of Civil Appeals of Houston, Texas rendered its opinion, affirming the judgment of the trial court below on October 8, 1980 and overruled a timely filed Motion for Rehearing on October 23, 1980. The Texas Supreme Court denied Petitioner Rupert Bell's Application for Writ of Error on January 14, 1981, no reversible error, which had the effect of affirming the appellate court's opinion. On February 11, 1981, the

judgment of the Texas Supreme Court became "final" in cause number B-9945, entitled Rupert Bell v. Herbert Harold Hinkle. The opinion of the appellate court is unreported to date, but is reproduced in relevant portions in Appendix "A" to this Brief.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1979) on the grounds that this is an action to redress the deprivation, under color of state law and regulation, of rights, privileges and immunities secured by the Constitution of the United States providing for equal rights for all citizens, 28 U.S.C. § 1343 (1979); 42 U.S.C. § 1983 (1979); and further because this case involves "federal questions" arising under the Constitution and laws of the United States, 28 U.S.C. § 1331 (1979).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The text of the following Constitutional provisions and statutes relevant to the determination of the present case are set forth in Appendix "B": U.S. Const. amend. V; amend. XIV; 28 U.S.C. §§ 1257, 1331, 1343; 42 U.S.C. § 1983, Texas Revised Civil Statutes, including Section 42 of the Texas Probate Code, Sections 11.03, 13.01, 13.09 and 13.21(e) of the Texas Family Code.

QUESTIONS PRESENTED

I. WHETHER RUPERT BELL, HAS STATED A VIABLE CAUSE OF ACTION UNDER THE UNITED STATES CONSTITUTION FOR WHICH RELIEF

COULD BE GRANTED DURING THE COURSE OF HIS TRIAL IN BRAZORIA COUNTY, TEXAS IN HIS CLAIM AS AN ILLEGITIMATE HEIR OF TOMMY HINKLE.

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V. WHETHER THE INJECTION OF RACIAL PREJUDICE THROUGHOUT THE COURSE OF THE TRIAL BELOW WAS OF SUCH A NATURE AS TO RENDER THAT TRIAL A TRAVESTY OF JUSTICE AND TO REQUIRE REVERSAL OF THE JURY VERDICT.

STATEMENT OF THE CASE

The parties will be referred to as Petitioner Rupert Bell and Respondent Herbert Harold Hinkle, for clarity. This is a trespass to try title action. Rupert Bell as Petitioner sued Herbert Harold Hinkle for his undivided one-half interest in fee simple to certain lands and premises described in the deed records of Brazoria County belonging to the Estate of James Thomas Hinkle, deceased, [Tommy Hinkle] and in addition to a one-half undivided interest in all personal property and funds as well as mixed personal and real property which constituted the total assets of the estate of Tommy Hinkle, all of the said assets were in the possession and custody of the Respondent, Herbert Harold Hinkle. In addition, Rupert Bell asked the Court for an accounting and a partition of all the properties he claimed.

The suit was originally filed July 13, 1976, and was voluntarily dismissed. Cause number 65,305-C was originally filed on September 27, 1976 in the 149th Judicial District Court of Brazoria County, Texas. Respondent Herbert Harold Hinkle, originally answered the lawsuit on October 22, 1976 and amended his answer on June 14, 1977, alleging that the District Court of Brazoria County, Texas had no jurisdiction over this cause of action because the Petitioner's case was barred by the two year statute of limitations, three year statute of limitations, four year statute of limitations, and/or five year statute of limitations.

In addition, Respondent alleged a plea of jurisdiction on the basis of the ten and twenty-five year statute of limitations. The Honorable Paul Ferguson granted the Respondent's Herbert Harold Hinkle, Plea of Jurisdiction

on August 19, 1977 and the Order of Dismissal was entered August 24, 1977. The Court of Civil Appeals for the Fourteenth Judicial District, Houston, Texas, reversed the dismissal of this cause and remanded it for a trial on the merits on October 16, 1978. The Respondent, Herbert Harold Hinkle, appealed this decision of the Court of Civil Appeals to the Supreme Court of Texas who denied the writ, no reversible error. Discovery then proceeded in the district court case and a trial was held October 1, 1979. Trial was to a jury which answered one Special Issue. Both parties having stipulated that should an accounting be necessary, it would be before the Judge alone. The only Special Issue submitted to the Jury was whether from a preponderance of the evidence James Thomas Hinkle [Tommy Hinkle] was the biological father of Rupert Bell. The jury answered this Special Issue "We do not", and a take nothing judgment was entered against the Petitioner and in favor of the Respondent, Herbert Harold Hinkle.

This appeal is based upon that trial beginning October 1, 1979, and continuing through October 5, 1979. During oral argument before the Court of Civil Appeals for the Fourteenth Judicial District of Texas, Houston, Texas, held on July 30, 1980, the parties were asked to submit supplemental briefs to address the issue raised during argument by Respondent Herbert Harold Hinkle; to wit: whether or not Rupert Bell had stated a cause of action which would allow him recovery by way of inheritance pursuant to the laws of descent and distribution of the State of Texas and under the Equal Protection and Due Process clauses of the Fourteenth Amendment of the United States Constitution, if he had been found by the

Brazoria County jury to have been the biological son of Tommy Hinkle.

On October 8, 1980 the Fourteenth Court of Civil Appeals, Houston, Texas affirmed the take nothing judgment entered against Rupert Bell and in favor of Herbert Harold Hinkle. On January 14, 1981 the Texas Supreme Court denied Petitioner's Application for Writ of Error, no reversible error, thereby affirming both the appellate and the trial court's decision entered against Rupert Bell. A Motion for Rehearing was duly overruled by the Texas Supreme Court on February 11, 1981. Therefore a "final" judgment was entered according to the highest court of the State of Texas on February 11, 1981 from which the Petition for Writ of Certiorari is taken.

STATEMENT OF FACT

This is a trespass to try title action brought by Rupert Bell claiming ownership of an undivided one-half interest in the estate of the deceased, Tommy Hinkle, which estate consisted of real and personal property in Brazoria County, Texas. It is undisputed that Tommy Hinkle was a man with substantial wealth who died without a will on August 20, 1969. It is undisputed that Herbert Harold Hinkle was a legitimate son of Tommy Hinkle and Sophie Knape Hinkle. It is also undisputed that no administration was ever taken out on the estate of Tommy Hinkle by either his wife, Mrs. Sophie Knape Hinkle or his legitimate son, Herbert Harold Hinkle. Mrs. Sophie Knape Hinkle died in 1975 intestate. Neither Mrs. Sophie Knape Hinkle nor Herbert Harold Hinkle ever claimed the land and personal property of the deceased, Tommy Hinkle in Brazoria County, by way of deed, purchase or sale.

Their claims to the estate of Tommy Hinkle rested solely on the laws of descent and distribution of the State of Texas. No probate hearing was ever taken out to declare the heirs of the estate and/or who was entitled to inherit.

The entire estate of Tommy Hinkle at the time of filing of this lawsuit on July 13, 1976 was and is in the possession of Herbert Harold Hinkle. Rupert Bell filed this lawsuit to obtain an accounting and partition of the estate of Tommy Hinkle and assert his rights to one-half of the decedent's property pursuant to the laws of descent and distribution of the State of Texas and of the United States of America and pursuant to the fact that he was and is the biological illegitimate son of the decedent, Tommy Hinkle.

Rupert Bell's mother, Mrs. Sofornia Bell Woodard, a Negro, testified she was the natural mother of the Petitioner. She was 76 years old at the time of this trial. Her birthdate was May 27, 1903. Her testimony clearly establishes that she was born and raised on the Hinkle's property in Brazoria County, Texas, known as the "Bates Place". Rupert Bell was born on May 20th, 1921, on the "Bates Place", when Sofornia was less than 18 years of age. Rupert Bell's biological father was Tommy Hinkle.

It is undisputed that Rupert Bell was a bastard, having been born not out of wedlock. At the time Sofornia Bell began having sexual intercourse with Tommy Hinkle, he was a single man 20 years her senior. His first wife died in childbirth and he did not remarry until October 9, 1922, more than a year after the birth of Rupert Bell. In 1922, he married Sophie Knape Hinkle, Caucasian, who was 19 years his junior, and the mother of Herbert Harold Hinkle.

Herbert Harold Hinkle, the Respondent in this case, was not born until July 29, 1930. Rupert Bell testified his father was Tommy Hinkle. Tommy Hinkle's brother, Varian Hinkle had told Rupert Bell that he was his uncle and that J. T. (Tommy) Hinkle was his father. Rupert Bell had worked on the Hinkle property all his life as a farm hand. A jury view of Rupert Bell's foot was permitted demonstrating the whiteness of his skin unaffected by 50 years of work in the sun.

On October 2, 1972, Rupert Bell filed a delayed birth certificate, which was admitted over the objection of counsel for Petitioner and a bill of exception was taken to the admission of this evidence. It was undisputed that Rupert Bell had never gone under any other name other than the one in which he was bringing this lawsuit. It was also undisputed that Rupert Bell was born May 20, 1921. The only relevancy this piece of evidence could have, was the blank left for who the Petitioner's father was. It should be noted that in 1972, an illegitimate son was not allowed to refer to his biological father in a birth certificate, according to the laws of Texas, Article 4477, Rule 47A, Tex. Rev. Civ. Stat. Ann. Art. 4477 R47A (1941).

The only direct evidence in this case of the paternity of Rupert Bell was his own testimony and the testimony of his mother.

The jury answered the one Special Issue submitted to it, which asked "Do you find from a preponderance of the evidence that James Thomas Hinkle was the biological father of Rupert Bell?" in the negative.

Petitioner brings this appeal and urges that the racial slurs throughout this trial rendered that verdict so against

the great weight and preponderance of the evidence, that the evidence was based entirely on bias and prejudice. The Fourteenth Court of Appeals did not reach the original points brought forward by Petitioner dealing with references to the black race as "animals" and "as members of a culture that did what their animal instincts prompted them to do, sexual and otherwise," because that court held that Rupert Bell, an illegitimate, was prohibited from inheriting from his biological father's estate even if the jury found Tommy Hinkle to be his father.

SUMMARY OF ARGUMENTS

This case presents issues similar to *Lalli v. Lalli* and *Trimble v. Gordon.* Can a state discriminate against illegitimate children and prohibit their inheritance from a natural parent, specifically the father. Shall children not be allowed the same opportunities and legal procedures to bring an involuntarily paternity suit during at the very least the lifetime of the father.

This case clearly illustrates a denial of due process and equal protection consequent upon the refusal of the State of Texas to grant an illegitimate child the same rights and opportunities to become legitimated as it affords biological fathers to a voluntary legitimate children. The appellate courts in Texas refused to go to the merits of this appeal dealing with the injections of racial prejudice during the trial and its influence on the jury. They found instead that the laws of the State of Texas prohibited an illegitimate child, such as Rupert Bell, to inherit from his biological father, Tommy Hinkle.

The question presented is whether or not a favorable jury verdict designating Rupert Bell as the biological son

of Tommy Hinkle would entitle him under the laws of Texas and the United States Constitution to recover as an heir of the estate of Tommy Hinkle.

There is clearly no basis for a state distinguishing between the procedures through which an illegitimate child can bring an involuntary paternity action and those procedures available to biological fathers to recognize their offspring. It is also clear that a father can voluntarily legitimate his children under Texas law at anytime during his lifetime. However, an illegitimate child or his representative at the present time in Texas must bring an involuntary paternity suit within one year of the birth of that child or it is forever barred.

This is clearly invidious discrimination under the Equal Protection Clause of the United States Constitution which discriminates against illegitimate children as a class from inheriting from their natural father.

ARGUMENTS AND AUTHORITIES

A. SECTION 42 OF THE TEXAS PROBATE CODE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

B. SECTION 13.01 OF THE TEXAS FAMILY CODE VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

Section 42 of the Texas Probate Code, Tex. Probate Code Ann. § 42 (1955), remained unaltered until May 28, 1977. [See Appendix B]. It categorically denied illegitimate children the right to inherit from their biological fathers. Section 42 was again amended on August 27,

1979, Tex. Probate Code Ann. § 42 (Supp. 1979). It is Plaintiff Bell's position that Section 42 of the Texas Probate Code was unconsitutional after its 1977 amendment per *Lovejoy v. Lillie,* 569 S.W.2d 501 (Tex. Civ. App. —Tyler 1978, writ ref'd n.r.e.), and in view of the Supreme Court's decision in *Trimble v. Gordon,* 97 S.Ct. 1459 (1977). It is Plaintiff Bell's position that Section 42 of the Texas Probate Code as it exists today and after its final 1979 amendment (effective date August 27, 1979) is unconstitutional because it purports to adopt Section 13.01 of the Texas Family Code (Supp. 1975) which statute is unconstitutional in view of the Fourteenth Amendment of the United States Constitution prohibiting invidious discrimination under the Equal Protection and Due Process Clauses.

The Fort Worth Court of Civil Appeals has recently declared Section 13.01 of the Texas Family Code an unconstitutional restriction on the rights of an illegitimate child to obtain support from his biological father. [Appendix "C"].

On the date of filing Rupert Bell's Petition, Section 42 of the Texas Probate Code denied absolutely an illegitimate child the right to inherit from his biological father and as such, Section 42 of the Texas Probate Code was unconstitutional in view of the Supreme Court of the United States decision in *Trimble v. Gordon,* 97 S.Ct. 1459 (1977), which held unconstitutional the similar provisions of the Illinois Probate Code which allowed children born out of wedlock to inherit by intestate succession only from their mothers whereas children born in wedlock may inherit by intestate succession from both their mothers and their fathers as denying equal protec-

tion under the Fourteenth Amendment to the United States Constitution. *Id.* at 1450.

A statutory classification based on illegitimacy must have a rational relationship to the legitimate state purpose and there was no legitimate state purpose presented to the Supreme Court of the United States.

Section 42 of the Texas Probate Code (1955) totally precluded an illegitimate child from recovering from its biological father under the laws of descent and distribution. Section 42 of the Texas Probate Code remained unaltered until May 28, 1977 when it was amended to include the voluntary legitimation procedures as adopted by the Texas Family Code. It did not adopt the involuntary legitimation procedures which were effective under Chapter 13 of the Texas Family Code, September 1, 1975. It was not until the final amendments to Section 42 of the Texas Probate Code [effective date August 27, 1979] that the Probate Code of the State of Texas had any means whatsoever for an illegitimate child to recover under the laws of descent and distribution from a biological father.

Today, Section 42 of the Texas Probate Code incorporates Section 13.01 *et seq.* of the Texas Family Code (Supp. 1975). Prior to a review of the relevant cases, Plaintiff contends that Section 42 of the Texas Probate Code was unconstitutional at the time of the death of Tommy Hinkle in 1969, was unconstitutional when this lawsuit was originally filed in 1976, was unconstitutional at the time this lawsuit was tried in October, 1979, after the effective date of its final amendment. Section 42 continues to invidiously discriminate against the rights of illegitimate children by providing a one year statute of

limitations for an involuntary paternity suit under Section 13.01 of the Texas Family Code. Tex. Family Code Ann. § 13.01 (Supp. 1975).

The United States Supreme Court, beginning with the case of *Levy v. Louisiana,* 88 S.Ct. 1509 (1968), began redefining the status or lack of status that a state may impose upon illegitimate children and their parents. For the first time, the Supreme Court held that illegitimate children were "persons" within the meaning of the Fourteenth Amendment Equal Protection Clause, and that the Louisiana classification denying wrongful death and survivor benefits to five illegitimate children for the death of their mother was invidious discrimination in violation of the United States Constitution. *Id.* at 1511. Justice Douglas wrote the opinion for the majority of the court. In *Levy v. Louisiana, supra,* and its companion case, *Glona v. American Guaranty and Liability Ins. Co.,* 88 S.Ct. 1515 (1968), this Court held that the individual rights asserted are based upon the "intimate familial relationship between the child and its own mother" and "we have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification, even though it had history and tradition in its side", *Levy, supra* at 1511. The Supreme Court for the first time rejected the rationale that the State advanced for upholding the classification scheme as constitutional—as a sanction against illicit relationships. The State's denial of both the mother's rights in inheriting for the wrongful death of her illegitimate child and the child's interest in the inheritance from its mother was constitutionally impermissible. This Court concluded that neither the denial of wrongful death benefits in either

situation would serve the State's interests in deterring illegitimate births.

Together, these two cases hold the State may not deny illegitimate children rights of their natural mother (*Levy*), nor may a State deny unwed mothers' rights in their illegitimate children (*Glona*). In fact, both cases seem to imply that there is no rational justification to exclude illegitimates from the classification of "children" under the Louisiana Survivors Statute, *Levy, supra* at 1511.

Justice Douglas went further to condemn any denial of civil rights because of the "status" of illegitimacy.

> *"Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He is certainly subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Services Act. How under our Constitutional regime can he be denied correlative rights which other citizens enjoy?" Id.* at 1511. (emphasis provided)

From the *Levy* and *Glona* decisions in 1968 the Supreme Court has dealt with the issue of the rights of illegitimates as protected by the Equal Protection Clause of the Fourteenth Amendment of United States Constitution in a series of cases. Although at times the Supreme Court has vacillated from the global position it took in *Levy* and *Glona,* it is clear that bastards do have rights to be protected and that a state's denial of those rights on the basis of illegitimacy will be *closely scrutinized.* While the Supreme Court has never held that the test will be "strict scrutiny" as in the case of racial discrimination, the Court has stated that the test is greater than the "rational relationship test" and somewhat less than the

"strict scrutiny" test. *Weber v. Aetna Casualty & Surety Company*, 92 S.Ct. 1400 (1972).

In *Labine v. Vincent*, 91 S.Ct. 1017 (1971), a case upon which Defendant Hinkle certainly relies, the Supreme Court rejected an attempt to invalidate a section of the Louisiana intestacy laws which provided that:

> "Natural children are called to the inheritance of their natural father who has duly acknowledged them . . . to the exclusion only of the State." *Id.* at 1019.

Justice Black, writing for the majority of the Court in this case held that *Levy* and *Glona* did not say that States should never treat a legitimate child differently from illegitimate offspring. *Id.* at 1019. Although giving no analysis, Justice Black stated that the choices reflected by intestate succession statutes were choices within the power of the State to make. *Id.* at 1020. Perhaps Justice Powell gave the insight for the decision in *Labine*, in *Weber v. Aetna Casualty & Surety Co., supra*, where he stated:

> "The decision reflected in major part, the traditional deference to a state's prerogative to regulate the disposition at death of property within its borders, the Court has long afforded broad scope to state discretion in this area." *Weber, supra*, at 1404.

Weber held that a State (Louisiana) could not deny death benefits under workmen's compensation statutes to a father's dependent, illegitimate child, for such benefits were statutorily accorded to legitimate dependents. *Id.* at 1406. The Court went on to hold:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. *But visiting this condemnation on the head of an infant is illogical and unjust.*" *Id.* at 1406. (emphasis provided.)

Weber reaffirmed that *Levy* and *Glona* were the precedents to follow, and in *Weber* the *denial of inheritance for wrongful death benefits was of the natural biological father, not the mother.* At common law an illegitimate child was considered to be "fillus nullius", "the child of no one." *H. Clark, Domestic Relations, Cases and Problems,* 224 (2d Ed. 1974).

Also decided in 1972 was *Stanley v. Illinois,* 92 S.Ct. 1208 (1972), where the rights of unwed fathers and their illegitimate children were granted constitutional protection. An Illinois statute defined the word "parent" to exclude a father of an illegitimate child. The Supreme Court reversed the Illinois decision on both due process and equal protection grounds. *Id.* at 1216-17. The *Stanley* Court found that a father had a fundamental right to conceive and raise his child which is a basic civil right of man far more precious than property rights. *Id.* at 1212. The Court approved of Illinois' *ends,* (which the state argued, "were to protect the moral, emotional, mental and physical welfare of the minor and the best interest of the community") but found that the means instituted by the State were constitutionally defective. It was held that the presumption that unwed fathers were automatically unfit, and therefore had no rights to have a hearing on their unfitness violated the Due Process Clause of the Fourteenth Amendment and invidiously discriminated against fathers of illegitimate children under

the Equal Protection Clause of the Fourteenth Amendment.

The Supreme Court cited with approval its decision in *Carrington v. Rash*, 85 S.Ct. 775 (1965) where the Court recognized that Texas had a powerful interest in restricting its voters to bona fide residents. However, the Court refused to tolerate a blanket exclusionary statute depriving all servicemen of the right to vote unless they had been Texas residents prior to induction when some servicemen clearly were bona fide residents and had the intention of residing or remaining in the State. This Texas statute was held unconstitutional and repugnant to the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 780.

Just as the Illinois statute in *Stanley v. Illinois, supra,* automatically precluded Mr. Stanley from having a hearing on his fitness as a parent and therefore excluded him from getting custody of his illegitimate child, the Texas statute excluding all servicemen not residents of Texas before induction as not having the right to vote, regardless of their individual qualifications, was repugnant to the Equal Protection Clause. *Stanley* at 1215. In *Stanley,* the Supreme Court recognized the state's argument that seldom are unmarried fathers fit to have custody of their children, however, a blanket discrimination against all unmarried fathers is clearly outside the scope of United States Constitution. In addition, the Court rejected the argument that administrative inconvenience and the prompt efficiency of justice to achieve legitimate state ends could be the basis of violating someone's rights under the Constitution.

> "But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general and the Due Process Clause in particular, that they were designed to protect the fragile values of the vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Id.* at 1215.

Again, in *New Jersey Welfare Rights Organization, et al v. Cahill,* 93 S.Ct. 1700 (1973), in which class action was brought by the Welfare Rights Organization alleging violation of the Equal Protection Clause of the Constitution by the New Jersey statutory program entitled: "Assistance to Families of the Working Poor" as discriminating against illegitimate children in providing financial assistance for poor families. The Organization challenged the provision in the statute that limited benefits only to qualified families that were composed of two ceremonially married adults of the opposite sex who had at least one minor child. *Id.* New Jersey upheld its scheme on the ground that it was designed to preserve and strengthen the family. *Id.* at 1701. The Court reiterated its position in *Weber, supra,* and said that visiting condemnation of irresponsible liaisons on the head of the infant is illogical and unjust.

> "Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. *Obviously, no child is responsible for his birth, and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent." Weber,* 92 S.Ct. 1400, 1406 (1972). (emphasis provided).

The Supreme Court reaffirmed its decision in *Gomez v. Perez*, 93 S.Ct. 872 (1973) where it overturned a portion of the Texas Family Code which denied illegitimate children support from their natural biological father as a violation of the Equal Protection Clause of the Fourteenth Amendment.

In 1973, Title 2 to the Texas Family Code was enacted (Tex. Laws 1973, Chapter 543, Section 1, at 1411). The proposed legislation under Chapter 13 contained provisions for both the voluntary and involuntary filiation of illegitimate children. See *Tex. Fam. Code's Symposium*, 5 Tex. Tech Law Rev. 267, 418 (1974). However, the Legislature only enacted the provision for voluntary acknowledgment of a child by the father, despite the Supreme Court's holding in *Gomez, supra.* This case brought to the Supreme Court of United States' attention the Texas statute stating that the natural father has a continuing and primary duty to support his legitimate children whether or not the marriage is dissolved by divorce. The Court held that the natural father has a duty to support his illegitimate children as well under the Equal Protection Clause of the United States Constitution.

Texas argued that since the Texas Legislature had not seen fit to provide a statutory duty of support from the biological father, the controlling law would be common law rule that illegitimate children, unlike legitimate children have no legal right to support from their fathers. *Home of the Holy Infancy v. Kaska*, 397 S.W.2d 208 (Tex. 1965). The *Gomez* Court held:

> "We have held that under the Equal Protection Clause of the Fourteenth Amendment a State may

not create a right of action in favor of children for the wrongful death of a parent and exclude illegitimate children from the benefit of such a right." Citing *Levy, supra.* "Similarly, we have held that illegitimate children may not be excluded from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their parent." *Weber, supra.*

"Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. *We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is 'illogical and unjust.'* " *Gomez, supra* at 875. (Emphasis provided).

The Court in *Gomez* did recognize that the problems of proof in a paternity suit are substantial, but it also noted that these problems are not to be lightly brushed aside, and they cannot be made into an impenetrable barrier that works to shield otherwise invidious discrimination, citing *Stanley, supra. Id.*

In *Trimble v. Gordon,* 97 S.Ct. 1459 (1977), the Supreme Court held unconstitutional a provision of the Illinois Probate Code which allowed children born out of wedlock to inherit by intestate succession only from their mothers, whereas children born in wedlock may inherit by intestate succession from both their mothers and their fathers, as denying equal protection. A statutory classification based on illegitimacy must have a rational

relationship to the legitimate state purpose and there was no legitimate state purpose presented to the Court.

In *Lalli v. Lalli*, 99 S.Ct. 518 (1978), an illegitimate son sought to compel an accounting of his deceased father's estate. The Supreme Court, after noting probable jurisdiction, held that the proof requirement imposed by a New York statute on illegitimate children that required a filiation order made by a court of competent jurisdiction during the father's life-time was substantially related to the important state interest intended to be promoted by the statute, and there was no violation of equal protection. *Id.* at 528.

The constitutional defect in Section 42 of Texas Probate Code, Tex. Probate Code Ann. § 42 (1955, and as amended 1977) is that there was no way for the child or anyone on behalf of the child to obtain an involuntary legitimation decree regarding paternity. The Texas Probate Code seemed intent upon allowing the father to voluntarily proclaim his child to be legitimate or to marry the mother. However, the child had no rights, vis-à-vis his father.

Section 42 of the Texas Probate Code was finally amended to incorporate Chapter 13, *et seq.* (involuntary paternity action) of the Texas Family Code. The final amendments of Section 42 were enacted on August 27, 1979. The constitutional defect with Section 42 after August 27, 1979 was the fact that it adopts Section 13.01 of Texas Family Code (Supp. 1975), which unconstitutionally and invidiously discriminates against an illegitimate child's rights to establish a parent-child relationship with his natural father by imposing a one year statute of limitation.

Section 13.01 of the Texas Family Code [effective September 1, 1975] provides a *one year statute of limitations for the bringing of a paternity suit that begins to run from the date of the child's birth, although the Family Code provides that a suit for voluntary legitimation of a child may be instituted at any time.* Tex. Family Code Ann. § 13.21(e) (Supp. 1975) (Emphasis provided).

On September 1, 1975, Texas became the last jurisdiction in the United States to enact legislation providing for the involuntary paternity of illegitimate children. See *G_____ v. P_____*, 466 S.W.2d 41, 42 (Tex. Civ. App. —San Antonio (1971), writ ref'd n.r.e.), *rev'd sub. nom. Gomez v. Perez,* 409 U.S. 535 (1973). As a result of this legislation in 1975 the Texas Family Code finally provided a means for illegitimates to obtain the full set of rights accorded to legitimate children by establishing a paternity procedure without the consent of the father.

Section 13.09 of the Texas Family Code Ann. (Supp. 1975) states:

> "The effect of a paternity decree is to 'create' the parent-child relationship between father and the child as if the child were born to the father and mother during marriage." *Id.*

If a parent-child relationship could be established under the 1975 amendments to the Texas Family Code, then obviously Section 42 of the Texas Probate Code was still unconstitutional in its 1977 amendments because it failed to incorporate the involuntary legitimation procedure as a means to grant an illegitimate child the right to inherit from his biological father. And Section 42 of Texas Probate Code is unconstitutional today because

the one year statute of limitations discriminates against the illegitimate child.

In *Lovejoy v. Lillie,* 569 S.W.2d 501 (Tex. Civ. App. —Tyler 1978, writ ref'd n.r.e.), the Tyler Court declared that Section 42 of the Texas Probate Code unconstitutional on the basis of *Trimble, supra.* The Tyler Court of Civil Appeals noted that *Trimble* was indistinguishable from the attack presented by Lovejoy on Section 42 of the Texas Probate Code. Section 42 of Texas Probate Code in 1978 provided for maternal inheritance and paternal inheritance only where the father voluntarily legitimated his child or had later married the mother. Section 42 did not adopt Section 13.01 of Texas Family Code regarding involuntary legitimation. The Tyler Court adhered to the well-established rule that appellate courts of Texas will always adjudicate whether a statute is constitutional when its unconstitutionality is obviously apparent, regardless of when or how the question is raised. *Id.* at 503. It added that pleadings are not necessary to raise this issue. *Id.* In no uncertain language, the Tyler Court ruled that Section 42 of the Texas Probate Code as it existed in 1978 was unconstitutional, because it violated the Equal Protection Clause of the Constitution by invidiously discriminating against illegitimate children. The Texas Supreme Court refused to grant the writ of error.

In *Lovejoy, supra,* Freddie Cooper Lovejoy died on December 15, 1971 in Houston, Texas, intestate. On or about August 1, 1973, a temporary administration was taken out by Hannah Thompson Lovejoy, the last woman to whom the deceased was ceremonially married prior to his death. On February 27, 1974 the administratrix

filed her Application for Determination of Heirship. Contestants appeared, including two women claiming to be common-law wives, three adult offspring of the two purported common-law wives, claiming to be children of the deceased. The Probate Court, sitting without a jury, entered judgment that all of the claimants were entitled to inherit from the decedent according to the laws of descent and distribution of the State of Texas. The administratrix appealed, alleging that the three adult illegitimate children of Lovejoy were not entitled to inherit one-half of his estate. The illegitimate children asserted that Section 42 of the Texas Probate Code was unconstitutional. The Tyler Court *held* that Section 42 of the Texas Probate Code was unconstitutional on June 8, 1978.

Plaintiff Bell submits that pursuant to the decision of the Ft.Worth Court of Civil Appeals in *In Re Miller, supra,* (Appendix C) declaring Section 13.01 an unconstitutional time restriction on an illegitimate child's rights to establish a "parent-child" relationship which is not similarly placed on the biological father's rights, Tex. Fam. Code Ann. § 13.21(e) (Supp. 1973) clearly gives him a cause of action against Defendant Hinkle. Prior to *Miller, supra,* Texas cases did not hold Section 13.01 [the one year statute of limitations] Tex. Fam. Code Ann. § 13.01 (Supp. 1975) retroactive for illegitimate children born prior to that date. See *Catchings v. Hamm,* 560 S.W.2d 194 (Tex. Civ. App.—Waco 1977, no writ); *Alvarado v. Gonzales,* 552 S.W.2d 539 (Tex. Civ. App. —Corpus Christi 1977, no writ); *In Re R____V____ M____,* 530 S.W.2d 921 (Tex. Civ. App.—Waco 1975, no writ).

In addition, it should be noted that the statute of limitations imposed by Section 13.01 of the Texas Family Code is in direct conflict with the general rule in Texas that during a child's minority a statute of limitations is tolled. Tex. Rev. Civ. Stat. Ann. Art. 5535 (Supp. 1975).

The Fourteenth Amendment of United States Constitution prohibits the State from depriving any citizen of life, liberty or property without due process of law or denying any citizen equal protection under the laws. Petitioner Bell has been denied his right to a fair and impartial hearing by a jury of his peers because of racial slurs and comments made by counsel for Respondent Hinkle throughout the course of that trial.

Rupert Bell has a cause of action under the Fourteenth Amendment to the United States Constitution which is in direct conflict with Section 42 of the Texas Probate Code. Prior to August 27, 1979, Section 42 denied absolutely the rights of an illegitimate to inherit from his father. The Supreme Court of the United States struck down a similar provision of the Illinois Probate Code in *Trimble v. Gordon,* supra. The Tyler Court of Civil Appeals in *Lovejoy v. Lillie,* supra, held that Section 42 of the Texas Probate Code was unconstitutional. At the time of the decision in *Lovejoy,* Section 42 of the Texas Probate Code did not adopt Section 13.01 *et seq.* of the Texas Family Code regarding involuntary paternity suits.

As amended August 27, 1979, the Texas Probate Code adopted Section 13.01 *et seq.* of the Texas Family Code, and as such, placed unconstitutional restrictions upon the rights of an illegitimate child to establish the parent-child

relationship between him and his biological father. This is an invidious discrimination because Section 13.21(e) of the Texas Family Code allows a father to voluntarily legitimize his child at any time. Tex. Family Code § 13.21 (e) (Supp. 1973).

There is a need for this Court to correct the errors below in order to declare Section 13.01 of the Texas Family Code and Section 42 of the Texas Probate Code unconstitutional in the interest of justice between the parties.

CONCLUSION

Petitioner prays that this Court grant this Application for Writ of Certiorari and reverse the decisions below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner-Appellant's Application for Writ of Certiorari has been served upon Attorneys for Respondent, Mr. Joyce Cox, of Sheinfeld, Maley & Kay, 3700 First City Tower, Houston, Texas 77002 and Mr. R. L. McElya, P. O. Box 606, Angleton, Texas 77515 by hand delivery or by Certified Mail, Return Receipt Requested, this the _____ day of May, 1981.

ALISON PETTIETTE

APPENDIX "A"

Affirmed, and Opinion filed October 8, 1980.

NO. A2396

RUPERT BELL, Appellant

v.

HERBERT HAROLD HINKLE, Appellee

Appeal from 149th District Court
of Brazoria County

Rupert Bell, appellant, appeals from a take nothing judgment entered against him and in favor of Herbert Harold Hinkle, appellee.

Bell brought a trespass to try title action against Hinkle for recovery of title to and possession of an undivided one-half interest in certain real property located in Brazoria County belonging to the estate of James Thomas Hinkle. In addition, he sought a partition of the real and personal property, an accounting and a right to the one-half of the property of the estate as an heir at law of James Thomas Hinkle. Appellant alleged that all of the assets of the estate were in the possession of appellee. Appellant further alleged that James Thomas Hinkle died intestate with no administration having been opened on the estate and the time for opening having passed.

Rupert Bell was born in Brazoria County in 1921. He alleged that he is the illegitimate son of the decedent, James Thomas Hinkle. Appellee, born in 1930, is the legitimate son of the decedent. James Thomas Hinkle died in 1969 intestate, and in 1976, appellant brought this suit. At trial, the jury found, in response to the sole special issue, that J. T. Hinkle was not the biological father of Rupert Bell.

Appellant mainly contends that defense counsel's remarks during the entire trial, including voir dire and final argument, were improper and constituted reversible error because such remarks were intended to appeal to racial prejudice. Although we do not approve of counsel's remarks, we do not reach this point because we must affirm on another ground. Appellee, in his cross-point, claims that appellant cannot recover anyway because he has not proved his cause of action as a matter of law. We agree.

Prior to 1979, an illegitimate child could not inherit from his father by the laws of descent and distribution. *See Guidry v. Denkins,* 460 S.W.2d 943 (Tex. Civ. App. —Houston [1st Dist.] 1970, no writ); 1955 Tex. Gen. Laws, ch. 55, at 88; 1977 Tex. Gen Laws, ch. 290, § 1, at 762. In 1979, the Legislature amended the Probate Code to allow illegitimate children to inherit from their fathers if certain conditions are fulfilled. TEX. PROB. CODE ANN. § 42 (Vernon Supp. 1980). An illegitimate child can inherit from his father "if the child is born or conceived before or during the marriage of his father and mother or is legitimated by a court decree as provided by Chapter 13 of the Family Code, or if the father executed a statement of paternity as provided by Section 13.22 of the Family Code. . . ." *Id.* (footnote omitted).

Since appellant has not brought a paternity suit under the Family Code, or met any of the other conditions, he can not recover under the statute.

Since appellant has not proved his cause of action, we do not reach appellant's points of error, and affirm on appellee's crosspoint.

Affirmed.

/s/ J. CURTISS BROWN
Chief Justice

Judgment rendered, and Opinion filed October 8, 1980.

Panel consists of Chief Justice Brown, Associate Justices Pressler and Junell.

APPENDIX "B"

Texas Probate Code prior to May 28, 1977.

§ 42. Inheritance Rights of Illegitimate Children

For the purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him. Such child shall also be treated the same as if he were a legitimate child of his mother for the purpose of determining homestead rights, the distribution of exempt property, and the making of family allowances. Where a man, having by a woman a child or children shall afterwards intermarry with such woman, such child or children shall thereby be legitimated and made capable of inheriting his estate. The issue also of marriages deemed null in law shall nevertheless be legitimate. Acts 1955, 54th Leg., p. 88, ch. 55.

Texas Probate Code after May 28, 1977.

§ 42. Inheritance Rights of Illegitimate Children

(a) Maternal Inheritance. For the purpose of inheritance to, through, and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue.

(b) Legitimation by Marriage. Where a man, having by a woman a child shall afterwards intermarry with such woman, such child shall thereby be legitimated, so that he and his issue shall inherit from his father and from his paternal kindred, both descendants, ascendants and collaterals in all degrees, and they may inherit from him and his issue.

(c) Legitimation by Voluntary Legitimation Proceedings. Where a man, having by a woman a child shall afterwards legitimate the child pursuant to a voluntary legitimation proceeding under Chapter 13, Family Code, such child and his issue shall inherit from his father but not from his paternal kindred; and the father but not the father's kindred shall inherit from such child and his issue.

(d) Homestead Rights, Exempt Property, and Family Allowances. Such child shall also be treated the same as it he were the legitimate child of his mother, and if legitimated by marriage or by a voluntary legitimation, as if he were a legitimate child of his father for the purposes of determining homestead rights, distribution of exempt property, and the making of family allowances.

(e) Marriages Null in Law. The issue also of marriages deemed null in law shall nevertheless be legitimate.

Amended by Acts 1977, 65th Leg., p. 762, ch. 290, § 1, eff. May 28, 1977."

Texas Probate Code after August 27, 1979.

§ 42. Inheritance Rights of Legitimated Children.

(a) Maternal Inheritance. For the purposes of inheritance, a child is the legitimate child of his mother, so that

he and his issue shall inherit from his mother and from his maternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue.

(b) Paternal Inheritance. For the purpose of inheritance, a child is the legitimate child of his father if the child is born or conceived before or during the marriage of his father and mother or is legitimated by a court decree as provided by Chapter 13 of the Family Code, or if the father executed a statement of paternity as provided by Section 13.22 of the Family Code, or a like statement properly executed in another jurisdiction, so that he and his issue shall inherit from his father and from his paternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue.

(c) Homestead Rights, Exempt Property, and Family Allowances. A legitimate child as provided by Subsections (a) and (b) of this section is a legitimate child of his mother, and a legitimate child of his father, for the purpose of determining homestead rights, distribution of exempt property, and the making of family allowances.

(d) Marriages Null in Law. The issue also of marriages deemed null in law shall nevertheless be legitimate.

Amended by Acts 1977, 65th Leg., p. 762, ch. 290, § 1, ef. May 28, 1977; Acts 1979, 66th Leg., p. 40, ch. 24, § 25, ef. Aug. 27, 1979; Acts 1979, 66th Leg., p. 1743, ch. 713 § 5, ef. August 27, 1979.

Texas Family Code.

Section 13.01, time limitation for paternity suits of the Texas Family Code Ann. (Supp. 1975) states as follows:

> "A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred."

Section 13.09 of the Tex. Family Code Ann. (Supp. 1975) states as follows:

> "The effect of a decree designating the alleged father as the father of the child is to create the parent-child relationship between the father and the child as if the child were born to the father and mother during marriage."

Section 13.21, Tex. Family Code. Voluntary Legitimation.

(a) If a statement of paternity has been executed by the father of an illegitimate child, the father or mother of the child or the State Department of Public Welfare may file a petition for a decree designating the father as a parent of the child. The statement of paternity must be attached to the petition.

(b) The court shall enter a decree designating the child as the legitimate child of its father and the father as a parent of the child if the court finds that:

(1) the parent-child relationship between the child and its original mother has not been terminated by a decree of a court;

(2) the statement of paternity was executed as provided in this chapter, and the facts stated therein are true; and

(3) the mother or the managing conservator, if any, has consented to the decree.

(c) The requirement of consent of the mother is satisfied if she is the petitioner. If the entry of the decree is in the best interest of the child, the court may consent to the legitimation of the child in lieu of the consent of the mother or managing conservator.

(d) A suit for voluntary legitimation may be joined with a suit for termination under Chapter 15 of this Code.

(e) A suit under this section may be instituted at any time.

Amended by Acts 1975, 64th Leg., p. 1261, ch. 476 § 24, eff. Sept. 1, 1975.

Section 11.03, Tex. Family Code Ann. (Supp. 1975) provides that:

> "A suit affecting the parent-child relationship may be brought by any person with an interest in the child, including the child (through a representative authorized by the court), any agency of the state or of a political subdivision of the state, and any authorized agency."

28 U.S.C. § 1331.

§ 1331. Federal Question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $100,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his capacity.

28 U.S.C. § 1343.

§ 1343. Civil Rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for *equal rights of citizens or of all persons within the jurisdiction of the United States;*

28 U.S.C. § 1257.

§ 1257. State Courts; appeal; certiorari

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

U. S. CONSTITUTION AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereto, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

U. S. CONSTITUTION AMENDMENT V.

No person shall be . . . *deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public* use without just compensation.

U.S.C. § 1983. Civil Action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress.

APPENDIX "C"

NO. 18328

IN THE COURT OF CIVIL APPEALS
For The Second Supreme Judicial District of Texas

IN THE INTEREST OF
JEREMY ALAN MILLER, A CHILD

FROM THE DISTRICT COURT OF
WICHITA COUNTY

OPINION

This is an appeal from a summary judgment granted defendant in a paternity action involving a constitutional challenge to the one year statute of limitations found in TEX. FAMILY CODE ANN. sec. 13.01* (Supp. 1980). That statute is as follows: Time Limitation of Suit: "A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred."

We reverse and remand.

Suit was brought by Brenda Miller, the natural mother, in the interest of Jeremey Alan Miller. Jeremey was born

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* All references to sec. 13.01 are to TEX. FAMILY CODE ANN.

May 21, 1978. Brenda Miller filed suit on October 11, 1979, alleging that respondent was the natural father of the child. Respondent answered and pled limitations under sec. 13.01 as a bar. The trial court sustained the plea, ordering petitioner's suit dismissed with prejudice.

On appeal Ms. Miller attacks the constitutionality of sec. 13.01 under Article 1, Sections 3 and 19 of the Texas Constitution, Fifth and Fourteenth Amendments to the United States Constitution and the Equal Rights Amendment to the Texas Constitution, alleging denial of due process and unequal protection under the law.

We will initially discuss whether the one year statute of limitations set forth in sec. 13.01 invidiously discriminates between legitimate and illegitimate children so as to deny them equal protection of the law.

At early common law an illegitimate child was considered nullius filius—the son of no one—of no mother; of no father. He was not entitled to support from anyone. Much has changed since then. Modern society shrinks from the application of the Old Testament (Exodus 20:5) commandment "visting the iniquity of the fathers upon the children . . ." as we progress to the more humanitarian view that there are no illegitimate children, only illegitimate parents. As the Court observed in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972):

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should

> bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent."

The reason for the trend is clear as society becomes progressively more aware that children, all children, deserve proper care, comfort, and protection. The stigma of illegitimacy imposes its own burdens without adding additional shackles in the form of legal impediments to the securing of the health, care, and welfare of children.

We therefore start with the premise that illegitimate children are not "nonpersons." They are human; alive; legally innocent at birth; and fully deserving of the aspirations our society bestows on their "legitimate" counterparts. They are "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The classification created by this statute is constitutionally suspect in that it creates separate classes among individuals similarly situated. Implicitly, it recognizes the common law right of legitimates to support from their parents during the entire course of their minority. Equally so, it recognizes the same right in illegitimates, provided, however, that they act within the first year of their existence to establish paternity. [Paternity suits are a prerequisite to child support for an illegitimate child. *Texas Dept. of Human Resources v. Delley,* 581 S.W.2d 519, 522 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).] Failure to so act under sec. 13.01 results in illegitimates being forever barred from the right to sue their natural father for child support, a limitation their legitimate counterparts do not share.

Appellant urges that there exists no similar limitation on the right of an illegitimate to sue his natural mother for support. We find that the statute assumes too much in concluding that every child will have knowledge of the identity of its natural mother. The illegitimate may sue to establish maternity (a first step to support) throughout the entire course of his minority. This obviously results in exposing the "illegitimate" mother to greater legal liability than the "illegitimate" father. This court will not indulge in the reckless, romantic notion that mothers are more caring and loving than fathers. While that may be true, it is not a distinction for the judicial system to make. We do conclude that women have every bit as much interest in avoiding "spurious claims" as men; that they would suffer the same difficulties in defending a suit brought after the one year expiration of the statute of limitations.

Speaking in regard to classifications involving illegitimates the Court in *Levy v. Louisiana,* 391 U.S. 68, 71 (1968), noted that "[w]hile a State has broad power when it comes to making classifications, it may not draw a line which constitutes an invidious discrimination against a particular class. Though the test has been variously stated, the end result is whether the line drawn is a rational one."

Appellants urge that sec. 13.01 is based upon the "suspect classification" of illegitimacy. Like race and national origin, they assert, illegitimacy is a characteristic determined solely by accident of birth; it is a condition beyond the infant's control; a status that subjects them to a stigma of inferiority and one which denies them access to the benefits accruing to their legitimate counterparts by way of common law.

The Supreme Court in *Levy* held that under the Equal Protection Clause of the Fourteenth Amendment a State may not create a right of action in favor of children for the wrongful death of a parent and exclude illegitimate children from the benefit of such a right. In *Weber* the Court found that illegitimate children may not be excluded from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their parent.

Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.

The primary constitutional authority in the area of paternity law is *Gomez v. Perez*, 409 U.S. 535 (1973). In Texas, both at common law and under the statutes of the State, the natural father has a continuing duty to support his legitimate children. *Lane v. Phillips*, 69 Tex. 240, 243, 6 S.W. 610, 611 (1887); TEX. FAMILY CODE ANN. sec. 4.02 (1979). Though this duty extends beyond dissolution of the marriage [TEX. FAMILY CODE ANN. sec. 14.05; *Hooten v. Hooten*, 15 S.W.2d 141 (Tex. Civ. App.—Texarkana), *aff'd* at 40 S.W.2d 52 (Tex. 1931)]; is enforceable on the child's behalf in civil proceedings; is the subject of criminal sanctions [TEX. PENAL CODE ANN. sec. 25.05 (1974), dealing with criminal non-support]; and exists despite the fact that the father may not have custody [*Hooten*], prior to *Gomez*, Texas did not recognize any enforceable duty on the part of the biological father to support his illegitimate child. At Texas common law illegitimate children, unlike their legitimate counterparts, had no legal right to support from their fathers. *Home of Holy Infancy v. Kaska*, 397 S.W.2d 208 (Tex. 1965); *Bjorgo v. Bjorgo*, 391 S.W.2d

528 (Tex. Civ. App.—Amarillo), *reversed on other grounds,* 402 S.W.2d 143 (1966).

In response to this unequal apportionment of rights, the Court in *Gomez* at p. 538 held that "once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is 'illogical and unjust.' "

The Texas response was sec. 13.01 which appellant alleges to be unconstitutional. At least two Texas courts of civil appeals have expressly upheld the constitutionality of the statute. In *Texas Dept. of Human Resources v. Chapman,* 570 S.W.2d 46, 49 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.), the court dispensed with the requirements of *Gomez* when it concluded that statutes of limitations, such as sec. 13.01, "relate to remedies, and do not destroy fundamental rights." Noting that *Gomez* mandated that a state may not "absolutely foreclose" the right of an illegitimate child to receive support from its natural father, the Dallas court found the one year "window" sufficient to satisfy constitutional requirements. *Texas Dept. of Human Resources v. Hernandez,* 595 S.W. 2d 189 (Tex. Civ. App.—Corpus Christi 1980, no writ) expressly based on *Chapman,* follows the same logic.

It is our opinion that the Dallas court incorrectly applied *Gomez.*

Two questions arise in construing the sec. 13.01 statute of limitations. Is a reasonable time, from the standpoint of the infant, accorded for the determination of his or her paternity? If not, the limitation will too soon fore-

close an important right, resulting in a denial of due process. The second question is more pressing. Does the limitation, by clearly discriminating between legitimates and illegitimates, violate the constitutional guarantee of equal protection under the law?

We agree with the Dallas court that statutes of limitations pertain to remedies and not to substantive rights. We do not conclude that, as a result, such limitations are immune from bringing about unconstitutional results. And we are mindful of the mandate in *Gomez* where the Court observed: "We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination." 409 U.S. 535, 538.

We note a more recent decision by the Dallas court where it dealt with an illegitimate born *prior* to the passage of the statute in question. Concluding that sec. 13.01 was not applicable due to ex post facto considerations, the Dallas court in *Delley, supra* at 522, applied the four year general statute of limitations found under TEX. REV. CIV. STAT. ANN. art. 5529 (1958). In response to appellant's assertion of TEX. REV. CIV. STAT. ANN. art. 5517 (1958) providing that the State shall not be barred by any statute of limitations, the court agreed but noted that as more than four years had passed between the accrual of the action and its transfer to the State, the right to assert the limitation had vested in the defendant.

Yet despite the age of the illegitimate (9 years), and the father's assertion of limitations, the Dallas court, in light of *Gomez,* found the limitation tolled under TEX.

REV. CIV. STAT. ANN. art. 5535 (Supp. 1980) due to the minority of the child. The Dallas court stated at p. 522: "As a matter of public policy, we doubt that fathers of illegitimate children should be absolved from the duty of paying child support merely because a paternity suit has not been filed within four years of the birth of the child." The court noted that the state has a compelling interest in assuring that the primary obligation for support of illegitimate children falls on both natural parents rather than on the taxpayers.

We note that the Dallas court found an undefined, yet implicit right in illegitimates to support, a right emanating from the combined sources of the common law right of legitimates to support and the mandate of *Gomez* that States interpose no impenetrable barriers to the vesting of the same right in illegitimates. We agree.

We also agree with *Kaur v. Singh Chawla,* 522 P.2d 1198, 1199 (Wash. App., 1974) dealing with a similar statute in which the court stated: "It is sufficient here to note that while Washington has denied an *illegitimate* child a common law right to support from its putative father, . . . it has recognized a *legitimate* child's common law right to support from its parents. (Citing cases.) The United States Supreme Court has condemned similar discrimination, statutorily imposed, as being an unconstitutional denial of equal protection. . . . Since Washington, by common law, 'posits' a right of *legitimate* children to support by their natural fathers which is as 'judicially enforceable' as a statutory right, we conclude that illegitimate children are also entitled to a 'judicially enforceable right . . . to needed support from their natural fathers . . .' ". In *Kaur* the court construed the statute as constitutional but only by determining it *not* to be the ex-

clusive method by which an illegitimate could bring a filiation proceeding.

The New Mexico Supreme Court, applying *Gomez*, dealt with a two year statute of limitations. In *Stringer v. Dudoich*, 583 P.2d 462, 463, 464 (1978), the New Mexico court held that the limitation applied to the mother but not the child. "Illegitimate children are entitled to the same support rights as legitimate children. . . . In New Mexico there is no time limitation on the right of the child born in wedlock to require the natural father to support him. . . . If there is no limitation on the right of a legitimate child to seek support from his parent, then there can be no limitation on the same right for an illegitimate child."

The Kansas Supreme Court in *Huss v. DeMott*, 524 P.2d 743 (1974), dealt with a statute remarkably similar to our own. KANS. STAT. ANN. 38-1104 (1973) stated: "No action to determine paternity shall be instituted more than one year after the birth of the child whose paternity is in issue." Noting that the determination of paternity was the first step by which an illegitimate could establish his right to support the court construed the statute as relating to the mother's cause of action only, holding it did not limit the time in which the illegitimate child may bring a non-statutory action.

Mindful of *Gomez* and the above state Supreme Court decisions, which we view as advisory, we find sec. 13.01 to be unconstitutional as it applies only to suits for paternity with no provisions being made for suits for maternity.

Additionally, we find the statute unconstituitonal in that it creates two classes, legitimates and illegitimates,

invidiously discriminating against the latter class. To hold otherwise would allow the illegitimate's rights to support to be waived by the mother. Not only would this result in unequal protection under the law, as legitimates are not subject to the same ultimate waiver and foreclosure of their rights to support by third persons, but such a denial would violate the illegitimate's constitutional rights to due process. Nullus jus alienum foris facere potest. The law does not permit one to forfeit another's rights. The right of an illegitimate child to assert a claim for parental support is too fundamental to permit its forfeiture by the mother's failure to timely institute a filiation proceeding.

We are aware of the concern forwarded by appellee regarding the rights of putative fathers to be free from stale or fraudulent claims. Yet we note this action is based on the father's obligation to support his child. That obligation extends to legitimate and illegitimate children alike. The obligation to support illegitimate children arises from the same source as the obligation to support legitimate children; the public policy of this State. For illegitimates, paternity must first be established in order to enforce the obligation to support. This action does not create a duty; it merely provides the machinery for the enforcement of a duty already existing. Liability for support attaches only as part of the responsibility for having brought the child into being.

We hold sec. 13.01 unconstitutional. We reverse and remand.

/s/ JOE SPURLOCK
Joe Spurlock, Justice.

July 24, 1980